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Supreme Court Decision Results in a Change to Standard Contracts

The decision of Dalton J in *Lai v Soineva* [2011] QSC 247 has resulted in a change in the latest versions of the REIQ contracts.

Facts

A buyer of a house sought specific performance of a contract of purchase. The contract was in the REIQ standard form for houses and residential land (8th ed) and was conditional upon the buyer obtaining a satisfactory Building and Pest Inspection report. The relevant standard clause was on the following terms:

4.1 Building and Pest Inspection

This contract is conditional upon the Buyer obtaining a written building report from a building inspector and a written pest report from a pest inspector ... on the Property by the Inspection Date on terms satisfactory to the Buyer ...

4.2 The Buyer must give notice to the Seller that:

(1) a satisfactory inspector's report under clause 4.1 has not been obtained by the Inspection Date and the Buyer terminates this contract. The Buyer must act reasonably; or

(2) clause 4.1 has been either satisfied or waived by the Buyer.

...

4.4 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 4.2 by 5 pm on the Inspection Date. This is the Seller's only remedy for the Buyer's failure to give notice.

4.5 The Seller's right under clause 4.4 is subject to the Buyer's continuing right to terminate this contract under clause 4.2(1) or waive the benefit of this clause 4 by giving written notice to the Seller of the waiver.

The Building and Pest Inspection Date in the contract was 28 June 2011. On 21 June 2011, the buyers' solicitors advised that their clients were not satisfied with their building and pest enquiries and that in light of this it had been agreed that a bank cheque for \$4,500 would be made available at settlement in favour of a pest eradication company. Based on later facts, it would seem that the sum of \$4,500 was intended to be used as payment for a termite barrier to be placed around the subject property.

Notwithstanding the contents of this communication, it was conceded by counsel for the buyers that no agreement had been reached to pay the sum of \$4,500. On the Inspection Date the sellers' solicitors send a facsimile transmission denying any agreement to make available the said sum.

The next day, 29 June 2011, being the day after the Building and Pest Inspection Date specified in the contract, the real estate agent for the sellers transferred \$4,500 into the buyers' solicitors' trust account as payment for a termite barrier. In taking this action, there was no suggestion that the agent was acting other than on his own account. The sellers did not authorise the payment. After transferring the money, the agent sent a facsimile to the buyers' solicitors to advise them of the transfer.

Having received this facsimile from the agent, on 29 June 2011, the buyers' solicitors send a facsimile to the sellers' solicitors on the following terms:

We refer to the above matter and have been instructed to [sic] by our clients to confirm that they are satisfied with the Pest and Building Condition of the Contract.

On 30 June 2011, the sellers' solicitors purported to terminate the contract by writing:

... A buyer can no longer give an effective notice of "satisfaction" under Clause 4.2 once the Inspection Date has passed.

Our clients have instructed us to terminate this contract pursuant to Clause 4.4 of the Terms of Contract because of failure of your client to give the requisite notice under Clause 4.2 by 5.00 pm on the Inspection Date.

This matter is now at an end and we will authorise the Deposit Holder to refund the deposit to your client.

Decision

For the sellers, it was submitted that the buyers' solicitors' facsimile of 29 June 2011 should be construed as an expression of satisfaction given pursuant to Clause 4.2(2) of the contract as a result of being satisfied with the financial result reached namely a contribution to the cost of a termite barrier. However, Dalton J did not consider it appropriate to determine the matter on the basis of drawing an inference as to subjective intention behind the sending of the facsimile. Rather, Dalton J considered that the proper course was to construe the contract, and the notices purported to be sent under the contract, in an objective fashion.

Construction of the Contract

Dalton J noted that clause 4.5 of the standard contract was favourable to the buyer in that it made it clear that even after a seller had accrued a right to terminate, but had not terminated, the buyer was able to *terminate* the contract on the basis of not obtaining a satisfactory report or *waive* the benefit of clause 4.1. However, in the absence of clause 4.5 expressly providing the buyer with a right to notify satisfaction of the condition after the seller's right to terminate had accrued, Dalton J opined that after 5pm on the Building and Pest Inspection Date, the buyer did not have a right to give notice under clause 4.2(2) of the *satisfaction* of the condition.

Construction of the Notice

Construing the contract in this manner, in order for the buyer to succeed, the facsimile sent by the buyers' solicitors on 29 June 2011 would need to be construed a waiver of the benefit of clause 4.1 within the meaning of clause 4.5 of the standard contract.

Dalton J held that the facsimile could not be construed as a waiver. In particular, Dalton J opined (at [17]):

... given the express requirement for written notice of “the waiver”, the words used in a cl 4.5 notice need to be an unequivocal communication of intent that the buyer chooses not to terminate the contract pursuant to cl 4.2(1) and gives up any remaining benefit it has under cl 4 of the contract. I do not think the facsimile of 29 June 2011 does that. Not only does it not use the word “waive” or “waiver”, it uses the word “satisfied”, the word used at cl 4.2(2) of the contract. Further, there is no unequivocal communication of intent to give up the right to terminate the contract pursuant to cl 4 of the contract. The facsimile of 29 June 2011 is, at best for the buyers, ambiguous. It is not sufficient to amount to a notice pursuant to cl 4.5 that the buyers waive the benefit of cl 4 of the contract.

On the basis of this conclusion that the buyers had not waived the benefit of the Building and Pest Inspection condition, Dalton J held that the sellers were entitled to, and did, validly terminate the contract by the facsimile sent by their solicitors on 30 June 2011.

Changes to the REIQ Contracts

The REIQ Contract for Houses and Residential Land (9th edition) and the Contract for Residential Lots in a Community Titles Scheme (5th edition) were approved for release on 5 December 2011. Amongst other changes, these latest versions of the REIQ contracts have been amended to take account of the decision of Dalton J in *Lai v Soineva* [2011] QSC 247. In particular, cl 4.5 has been amended to now provide:

4.5 The Seller’s right under clause 4.4 is subject to the Buyer’s continuing right to give written notice to the Seller of satisfaction, termination or waiver pursuant to clause 4.2.

As can be seen, the addition of the word “satisfaction” to the words “termination” and “waiver” overcomes the limitations of the previous version of cl 4.5 as identified by Dalton J and makes it clear that a buyer may give notice of a satisfactory Building and Pest Inspection after 5pm on the Building and Pest Inspection Date provided the seller has not already exercised the termination right granted by cl 4.4.

Notwithstanding this change to the REIQ contracts, it will remain prudent practice for notice to be given on or before 5pm on the Inspection Date if a buyer does not wish a right of termination to accrue to the seller.

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